Supreme Court, U.S.
FILED

04-803 DEC 10 2004

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In The
Supreme Court of the United States

MAISIE SHENANDOAH, et al. Petitioners

v.

ARTHUR RAYMOND HALBRITTER et al. Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Since early 1993, petitioners and respondents have been embroiled in a dispute over the legitimacy of the respondents' claim and exercise of power over the Oneida Indian Nation of New York. Petitioners are Traditional Oneida Indians recognized by the Bureau of Indian Affairs on July 29, 1987 as the Oneida Indian Nation government.

Over petitioners' objections, respondents successfully lobbied New York politicians and the BIA to have respondent Halbritter appointed as 'leader' so that a secretly negotiated Turning Stone Casino could go forward. Petitioners' appeal of the BIA's decision is still pending before the Department of Interior. In 1993-1995, respondents pronounced the petitioners guilty of 'treason' and punished petitioners by stripping petitioners of all tribal benefits and rights, labeling petitioners '*members-not-in-good-standing*'.

During 2000-2001, respondents enacted several pieces of *retroactive* legislation called a 'housing program'. Petitioners have challenged respondents' "housing program" as a ***bill of attainder*** as applied to them in violation of the Indian Civil Rights Act because only petitioners are being made homeless and incapable of living on the Nation's sovereign territory under the 'program'.

Questions presented are:

1. Whether 25 U.S.C. §1302(9) of the Indian Civil Rights Act (ICRA), vests the U.S. Courts with subject matter jurisdiction to, first, determine whether challenged legislation enacted by an Indian Nation is in fact a *bill of attainder* and then to grant such *habeas corpus* relief under 25 U.S.C. §1303 as is necessary to release the victims of a *bill of attainder* from the *lingering restraints* upon their liberty resulting from such *bill of attainder*?

2. Whether respondents' legislatively enacted 'housing program' is a *bill of attainder* as applied to the petitioners under the three pronged test articulated in Cummings v. Missouri, 71 U.S. 277, 323 (1867)?

PARTIES TO THE PROCEEDINGS

The Petitioners are MAISIE SHENANDOAH, ELWOOD FALCON; DIANE SHENANDOAH; minor child ADAH Shenandoah by and through her mother, Diane Shenandoah; minor child PETE Shenandoah by and through his mother, Diane Shenandoah; minor child CAMERON Shenandoah by and through his mother, Diane Shenandoah DANIELLE SHENANDOAH-PATTERSON; minor child CLAIRESE Patterson by and through her mother, Danielle Shenandoah-Patterson; minor child JOLENE Patterson by and through her mother, Danielle Shenandoah-Patterson; minor child PRESTON Patterson by and through his mother, Danielle Shenandoah-Patterson; VICTORIA SHENANDOAH-HALSEY; MATTHEW JONES; minor child WESLEY Halsey by and through his mother, Victoria Shenandoah-Halsey; minor child VINCENT Halsey by and through his mother, Victoria Shenandoah-Halsey; MONICA ANTONE-WATSON; minor child MARTINA Watson by and through her mother, Monica Antone-Watson; minor child KYLE Watson by and through his mother, Monica Antone-Watson; LAWRENCE THOMAS and ARNOLD THOMAS

Petitioners consist of members of six (6) 'household families', each family living in their privately built and owned home on Territory Road within the 32-acre Oneida Nation Territory. The petitioners are primarily single mothers and children and are represented by pro bono counsel.

The Respondents are ARTHUR RAYMOND HALBRITTER; PETER CARMEN; MARILYN JOHN; DICK LYNCH, PAUL RINKO; STEWART F. HANCOCK; RICHARD SIMONS; ARTHUR PIERCE; GARY GORDON; 'JOHN DOES' being all members of the Men's Council; 'Jane Does', being all members of the Clan Mothers; JEFF JOST; JACK McQUEENIE; DAN CAPUTO; KEVIN STORM; CHRIS MANWARING; GENE RIFENBURG; LARRY KUTZ; OFFICER URTZ;

FRANK SIMINELLI; LORI BILLI; CORKY RYAN; KEVIN O'NEIL; BILL PENDOCK; and Oneida Housing Corporation, Inc.

Respondents include Raymond Halbritter whom the BIA appointed as 'leader' on August 11, 1993 and those whom Halbritter has appointed to legislative bodies he created and calls the "Men's Council" and "Women's Council", as well as those who carry out and enforce the legislation against the petitioners including Peter Carmen, the respondents' "prosecutor". Respondents exercise control over the Oneida Indian Nation and operate the Turning Stone Casino.

The Oneida Indian Nation of New York is not a party to this action because this is a *habeas corpus* action by the petitioners against the individual respondents who have legislatively enacted the 'housing program' being attacked by petitioners as a bill of attainder in violation of the Indian Civil Rights Act.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was issued on April 2, 2004 and is reported at *Shenandoah v. Halbritter,* 366 F.3d 89, (C.A.2 (N.Y.), 2004) and appears in the Appendix at A-1 - A-6. The order denying the Petition for Rehearing and Rehearing *en banc* is unreported and appears in the Appendix at A-27.

The memorandum decision and order dated August 8, 2003 of the district court summarily granting respondents' motion to dismiss petitioners' Complaint under FRCP 12(b) for lack of subject matter jurisdiction is published at *Shenandoah v. Halbritter* 275 F.Supp.2d 279 (N.D.N.Y., 2003) and is attached at A-7 – A-26.

JURISDICTION

The judgment of the Court of Appeals was issued on April 2, 2004. The Petition for Rehearing or Rehearing *en banc* was denied on September 14, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), the following statutory provisions are involved in the case:

> *No Indian Tribe in exercising powers of self-government shall - (9) pass any bill of attainder or ex post facto law.* 25 U.S.C. §1302(9) Indian Civil Rights Act (ICRA).
>
> *The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.* 25 U.S.C. §1303 - ICRA

STATEMENT OF THE CASE

The issues raised in this Petition are of critical importance to all persons, Indian and non-Indian, throughout Indian Country who are subjected to lingering restraints upon their liberties resulting from bills of attainder.

This appeal raises novel issues of law with potentially far-reaching implications as to whether the significant fundamental rights and protections created by the U.S. Congress under the ICRA, particularly those pertaining to prohibitions against any Indian Nation enacting ***any*** bill of attainder, have meaning, substance and forum in the U.S. Courts as intended by Congress.

Moreover, the Second Circuit's decision is in direct conflict with decisions of this Court pertaining to Bills of Attainder and the *unreasonable lingering restraints* upon liberty caused by any bill of attainder.

Further, the panel's decision creates an inter-circuit conflict. In its April 2, 2004, decision, the Second Circuit Court of Appeals acknowledged that this matter was not a simple dispute over money, membership or tribal benefits, but involves questions of whether respondents' 'housing program' was a weapon designed and intended to rid the Oneida Indian Nation of the petitioners and the petitioners only. Petitioners have a decade long dispute with respondents. Respondents have themselves admitted that the "housing program" was devised as a tool to rid themselves of their political opponents, the petitioners.

In its decision below, the Second Circuit quoted the following language from *U.S. v. Brown,* 381 U.S. 437, 442, (U.S.Cal. 1965):

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment

> by acts of the legislature. The dangerous consequences of this power are manifest. *If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.*' [FN18] [emphasis added]
> FN18. III (John C.) Hamilton, History of the Republic of the United States, p. 34 (1859), quoting Alexander Hamilton. Ibid at 444

The Second Circuit in its decision below conceded that the danger may exist here that the respondents are abusing their control over the Nation to legislatively "*disenfranchise [petitioners to] confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy*" " and further observed:

> If this danger exists in cases such as the instant one, and the presence of twenty or thirty Indian women engaged in prayer in the courtroom and adjoining hallway when this appeal was argued is some indication of its possible existence, *Congress should consider giving this Court power to act*.
> [emphasis added]

The Court of Appeals decided that while the acts complained of may, in fact, evidence respondents' "*doctrine of disqualification, disfranchisement, and banishment*", it did not vest U.S. courts subject-matter jurisdiction.

Petitioners by contrast contend that this is a misreading of ICRA and in particular that this misreading

creates a split in the Circuit courts. Other Circuit Courts of appeal have found that proper use of the ICRA, forceful but within the bounds as set, empowers and obligates the U.S. Courts to enter *habeas* orders releasing petitioners from the lingering unreasonable restraints upon their liberties caused by the respondents' bill of attainder housing program.

An appropriate balance between the sovereignty of Indian Nations and the interests of the U.S. Government will protect Indians and non-Indians from the lingering and despotic restraints upon liberty imposed by bills of attainder. By its very definition, a *bill of attainder* is the legislative infliction of *additional punishment* upon only an individual or and identifiable group.

With the enactment of the Indian Gaming Regulatory Act ("IGRA"), there is greater temptation by those in power over an Indian Nation to abuse that power to target and disenfranchise any who dare oppose them.

Refusal of the U.S. courts to hear petitioners' claims strikes at the very heart of Indian law principles with devastating consequences for all victims of bills of attainder throughout American Indian/Alaska Native communities. The decision denies to such victims the protection of the only forum *expressly available* to them, the U.S. Courts, for obtaining release from the restraints upon their liberty caused by bills of attainder.

RESPONDENTS' ADOPTED A 'HOUSING PROGRAM' AS A BILL OF ATTAINDER AGAINST THE PETITIONERS IN THEIR DECADE LONG POLITICAL DISPUTE WITH PETITIONERS

The petitioners and respondents have been embroiled since early 1993 in a political dispute over the legitimacy of the respondents' claim of power and control over the Oneida Indian Nation ("OIN") of New York. The petitioners are Traditional Oneida Indians and comprised the government of

the Traditional Oneida Indian Nation of New York officially recognized by the Bureau of Indian Affairs on July 29, 1987.

In early 1993, without any authority from or notice to the then recognized Traditional government of the Oneida Indian Nation of New York, Halbritter and the respondents secretly negotiated a Gaming Compact with New York. In disgust at this abuse of apparent agency, the recognized Traditional OIN government removed Halbritter. The BIA accepted this properly executed OIN action on August 10, 1993, but then, bowing to New York state political pressure, reversed and reappointed Halbritter on August 11, 1993, as 'leader' of the Nation so that the secretly negotiated casino could go forward over the objections of petitioners.

An appeal of this decision is pending before the Department of Interior. The B.I.A. has not yet acted on the appeal, as the Court of Appeals noted in *Shenandoah v. U.S. Dept. of Interior, et al.*,159 F.3d 708, (C.A.2 ,1998.)

Petitioners have continuously and peacefully expressed their rejection of and opposition to respondents' claim of authority. Petitioners maintain that respondents are wrongfully in control of the Indian Nation and are using the revenues from the Turning Stone Casino to solidify that illegitimate control.

In 1993 and 1995, the respondents used their BIA appointed control over the Nation to pronounce the petitioners guilty of 'treason' without any trial or hearing. As punishment for such 'treason', respondents stripped petitioners of all tribal benefits and participation, labeling petitioners 'members-not-in-good-standing' of the OIN.

In 1996, some of the petitioners, including petitioner Traditional Clan Mother Maisie Shenandoah, commenced a lawsuit in the U.S. Federal Courts against some of the respondents, including Halbritter, seeking *inter alia*: (a) reinstatement of the of the B.I.A.'s 1993 decision to accept petitioners as Traditional Leaders of the Traditional form of sovereign Oneida self-governance; (b) removal of Halbritter

from the Oneida government; and (c) a holding that the respondents had violated the petitioners' rights under the ICRA by stripping petitioners of any and all rights, benefits, participation and standing within the Oneida Indian Nation.

In *Shenandoah et al v U.S. Dept. of Interior, Halbritter*, et al, 1997 W.L. 214947 (N.D.N.Y., 1997) (not herein appealed from), the district court described the leadership dispute between the petitioners and respondents. The court compared the ***punitive*** sanctions imposed by respondents ***up to that point in time*** to the facts and holding of *Poodry v Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir), cert denied 519 U.S. 1041 (1996). In dismissing petitioners' complaint in 1997, the district court noted:

> For purposes of this motion, ***defendants Halbritter*** and John do not dispute the Second Circuit's holding [in Poodry] that ***permanent banishment*** constitutes custody or detention. (citation omitted) Rather, they argue that the allegations of plaintiffs' complaint do not constitute permanent banishment. In other words, ***defendants contend that the punishments plaintiffs received*** fall below Poodry in the continuum of habeas corpus protection.
>
> *Shenandoah*, 1997 W.L. 214947 *supra.*

The district court dismissed petitioners' 1997 complaint for lack of subject matter jurisdiction:

> In stark contrast [to Poodry], petitioners have not alleged that Halbritter and John served them with any notice of banishment *or attempted to remove them from Oneida Nation territory*. . . . Until such time as petitioners suffer actual banishment rather than essential banishment they allege, their remedies lie within the political process of the sovereign Oneida Nation and not the confines of the federal district court.
>
> *Shenandoah*, supra, (emphasis supplied)

Petitioners appealed the district court's decision resulting in the decision of the Second Circuit Court of Appeals in *Shenandoah v. U.S. Dept. of Interior, et al.*, 159 F.3d 708, (C.A.2,1998).

In that decision (not herein appealed from), the Court of Appeals detailed the long history of the leadership dispute between petitioners and respondents and affirmed the district court's dismissal of petitioners' complaint and ruling that as of 1997 the *respondents had **not yet** done enough to petitioners* to bring petitioners' claims within the ICRA *habeas corpus* provision.

> Plaintiffs' complaint alleges that one or more of the six plaintiffs were suspended or terminated from employment positions, lost their "voice[s]" within the Nation's governing bodies, lost health insurance, were denied admittance into the Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities such as the casino, Turning Stone park, the gym, and the Bingo Hall, were stricken from Nation membership rolls, were prohibited from speaking with a few other Nation members, and were not sent Nation mailings.
>
> Although the alleged misconduct, if true, is serious, it is insufficient to bring plaintiffs within ICRA's habeas corpus provision [at this time].
>
> *Shenandoah v. U.S. Dept. of Interior, et al.*, 159 F.3d at 714 (1998).

RESPONDENTS' USED FIVE STEPS TO DEVISE THEIR "HOUSING PROGRAM" TO TARGET ONLY PETITIONERS FOR ADDITIONAL PUNISHMENT

Taking lessons from *Poodry* and *Shenandoah*, supra., respondents knew that they must avoid using the term 'banish' in any scheme to remove petitioners from OIN territory. Immediately after the Second Circuit's 1998

decision in *Shenandoah*, supra., respondents instructed their attorneys "*to evict the petitioners and the other "dissidents" from the 32-acre Oneida Nation territory*".

Respondents' admitted intention was to devise a means by which to remove the petitioners from the Oneida Indian Territory and avoid actually using the term 'banish' which would trigger ICRA according to *Poodry* and *Shenandoah*. Respondents concocted a "*health and safety housing plan that could be used to accomplish the same ends [forcible ejectment and banishment of petitioners from the Territory] and provide a seemingly "legitimate" justification for ridding the Territory of the dissidents [the petitioners]" [quote from respondents' own attorney respondent Rinko]*.

Respondents' own attorneys admitted that the plan of respondents was to forcibly eject petitioners from the Sovereign Territory of the Oneida Indian Nation by using the subterfuge of a 'housing' program. Respondents' original plan for forcibly removing only the petitioners off of the Territory was to designate the entire 32-acre Territory as a 'cultural and historical site' and bar individuals from living on the site.

But because that plan would affect and remove individuals besides the petitioners,, respondents instead decided to enact and retroactively apply new housing standards designed to ensure that petitioners' homes, and ONLY petitioners' homes, would be condemned with no opportunity to appeal or ability to cure or avoid being condemned.

FIRST STEP - IDENTIFY EXISTING TRAITS OF PETITIONERS' HOMES WHICH WOULD BE DEFINED AS 'DEFICIENCIES' UNDER THE NEW RETROACTIVE STANDARDS

In 1999, the respondents conducted inspections of petitioners' homes for the purpose of identifying specific characteristics which respondents could specifically prohibit

under respondents' new 'housing' program. By defining existing traits of petitioners' homes as 'deficiencies' under their new retroactive housing code, respondents made certain that petitioners' homes would immediately fail to meet the new standards, and thus could be ordered condemned and demolished.

For example, petitioners' homes do not 'sit' on a 'foundation'. Respondents purposely wrote the new retroactively applied housing standards so as to require all homes within the 32-acres to be on foundations or else to be immediately demolished despite the fact that petitioners' homes are safe and habitable but for respondents' retroactive standards purposely chosen to fail petitioners' homes. The new retroactive standards dictated by respondents under the housing program followed neither national, state, nor local building codes. The selected characteristics were not a health or safety issue nor a violation under any other codes, but only a 'defect' because of respondents' intentional retrospective definition to make certain petitioners' homes 'failed' and would be condemned.

SECOND STEP – PROHIBIT ANY REPAIRS OR CORRECTIVE WORK TO CURE 'DEFICIENCIES'

Petitioners were then prevented by fiat from in any way correcting the violation. For example, respondents prohibited any home from being moved in order to place it on a foundation.

THIRD STEP - LIMIT APPLICATION OF THE NEW 'HOUSING PROGRAM' TO ONLY THE 32-ACRES UPON WHICH ALL DISSIDENTS LIVED

Because there were (and are) many homes within the OIN territory of approximately 14,000 acres with identical traits and characteristics to those of petitioners, respondents limited the scope of their new retroactive standards to only the 32-acre parcel upon which petitioners lived.

FOURTH STEP - PROVIDE FINANCIAL PACKAGE TO ENABLE ALL OTHERS EXCEPT PETITIONERS TO REBUILD NEW HOMES AND AVOID CONSEQUENCES

There were, however, also homes on the 32-acre Territory identical to those of petitioners, including that of respondent Clint Hill, another member of the 'men's council'. Respondent Hill's home would also be condemned under respondents' new retroactive housing program because it was not on a foundation. Respondents therefore created a financial compensation/assistance program so that those whose homes were demolished could rebuild and continue living on OIN sovereign land.

This financial package includes a Nation-backed mortgage necessary to obtain mortgage financing for homes built on sovereign OIN territory as well as covering any and all costs and expenses associated with having one's home condemned including moving expenses and temporary housing while the new home was being built as well significant grants to assist with the cost of the new home.

Therefore, respondents' fourth step was to use the Nation's financial resources to enable people whose homes on the 32-acre were being condemned to replace their homes.

FIFTH STEP – FIND A LABEL THAT ONLY REFERRED TO THE PETITIONERS AND DENY ALL FINANCIAL ASSISTANCE TO ONLY THOSE WITHIN THAT LABEL

The fifth step in respondents' planned, constructive banishment of the petitioners was to devise a way to make the housing replacement financial package available to everyone except for petitioners.

Financial assistance was *absolutely necessary and essential* to replace condemned and demolished homes. But because respondents themselves had previously punished the

petitioners by stripping them of tribal benefits and labeling them as tribal members "NOT-in-good-standing," respondents were able to target the petitioners by denying the home replacement package to any tribal member "*NOT-in-good-standing*."

Out of the approximately 1,000 members affected by the new housing program, the only ones "not-in-good-standing" were the petitioners. Even though respondents themselves had previously cut off any and all tribal benefits to the petitioners, respondents deny any responsibility for the low-income economic status of the petitioners and now exploit it to accomplish their banishment not only from income, but from home and Nation as well.

BY DESIGN AND INTENTION, THE CUMULATIVE IMPACT OF RESPONDENTS' HOUSING PROGRAM WAS TO LEGISLATIVELY INFLICT UPON ONLY THE PETITIONERS THE ADDITIONAL PUNISHMENT OF HOMELESSNESS AND BEING RENDERED INCAPABLE OF LIVING ON ANY OF THE ONEIDA NATION'S LANDS

By labeling existing characteristics of petitioners' homes as 'deficiencies', respondents guaranteed that petitioners' homes would be *immediately condemned* for demolition without any ability to challenge the condemnation or do repairs to avoid the sentence.

By denying *to only the petitioners* the financial package given to all others affected by the 'housing program', the respondents targeted *only the petitioners* to suffer the additional punishment of being made homeless and unable to continue living on OIN territory. *Respondents exploited the low-income economic condition of petitioners to achieve the goal of rendering petitioners homeless.*

The targeted punitive purpose of respondents' 'housing' program' as applied to petitioners makes respondents' 'housing' program a Bill of Attainder *as*

applied to petitioners because only petitioners will suffer the lingering never ending restraints upon their liberties to live on OIN lands. The record shows that this is not a mere accident of the intersection of various policy elements, but was its generative intent.

RESPONDENTS' ARMED ENFORCEMENT OF THEIR NEW 'HOUSING PROGRAM'

After respondents adopted their new 'housing program' in 2000, the petitioners immediately objected that it targeted them for different treatment and would result in their being made homeless. However, because respondents had stripped petitioners of any and all rights of Oneida Nation membership, petitioners had no voice, nor vote nor other rights to affect the legislation.

In November 2001, in direct enforcement of their 'housing program,' respondents, numbering over 20 armed and uniformed officers, issued orders to themselves authorizing themselves to forcibly enter the home of petitioner Danielle Schenandoah-Patterson to conduct an 'inspection' whose outcome was predetermined.

Petitioner Danielle Schenandoah-Patterson protested the invasion of her home by respondents. The respondents seized, handcuffed and incarcerated her. Respondents claimed that she had 'interfered' with their 'inspection'.

Approximately one year later, the respondents brought criminal charges against petitioner Danielle Schenandoah-Patterson in respondents' tribal court. On a Friday evening in October 2002, the respondents for the second time, forcibly seized and handcuffed petitioner Danielle Schenandoah-Patterson. They drove her seven (7) hours away to be incarcerated in a Pennsylvania Maximum Security Prison where she was stripped searched and body cavity searched and placed in isolation.

After three days of imprisonment and separation from her three minor children (all of whom are also petitioners in

this action), respondents in their casino jet brought petitioner back, in handcuffs and shackles, to 'stand trial' before them.

Respondents informed petitioner that she would remain in custody unless and until she gave respondents permission to demolish her home. Even though she knew this would leave her and her three children homeless, she ultimately 'consented' due to the duress and coercion and her need to be reunited with her three minor children. Respondents gave petitioner '24-hours' to remove all of her possessions and vacate her home, whereupon, respondents immediately demolished her home.

Immediately after demolishing her home and rendering her homeless, the respondents then used their control over the OIN to instigate and finance a child custody action against petitioner in the New York State Courts seeking to have custody of her three children taken away from her for the sole reason that she was now homeless, it being irrelevant to respondents that they themselves had made her homeless.

LOWER COURTS IMPROPERLY DENIED JURISDICTION BECAUSE THEY FAILED TO SEE LINGERING RESTRAINTS UPON PETITIONERS' FREEDOMS CAUSED BY THE BILL OF ATTAINDER

In the decision appealed from, the district court found horrific ordeal suffered by petitioner Danielle Shenandoah-Patterson and her three minor children to show sufficient restraints upon their liberties.

The district court, and Second Circuit, completely overlooked the severe lingering restraints upon the petitioners' liberty caused by the bill attainder 'housing program.' Petitioners suffer to this day severe restraints upon their liberties due to the sentence of additional punishment under respondents' bill of attainder 'housing' program. The most critical of these restraints is petitioner's

inability, as plotted by respondents, to live on the traditional 32-acre OIN territory.

ONLY THE PETITIONERS ARE PRESENTLY SUBJECT TO ORDERS OF RESPONDENTS TO IMMEDIATELY VACATE THEIR HOMES AND SUFFER HOMELESSNESS UNDER RESPONDENTS' SO-CALLED HOUSING PROGRAM

In November 2002, the respondents issued their orders for the very same forced armed inspections of the other petitioners' homes as respondents had done to petitioner Danielle's home in November 2001.

In an effort to stop not only the sham inspections but also enjoin any and all other enforcement of respondents' 'housing' program against the petitioners, the petitioners commenced the subject action in the district court.

On July 23, 2003 the respondents issued their "NOTICE and **ORDER** of CONDEMNATION, DEMOLITION and REMOVAL":

A Condemning petitioners' homes for failing to have a foundation [which respondents prohibit petitioners from curing];

B ***ordering*** petitioners to immediately vacate their homes under threat of arrest; and

C ***ordering*** the immediate seizure, forfeiture, and demolition of petitioners' homes.

The petitioners live in a constant state of fear and apprehension under the tyranny of respondents. Only the petitioners are subjected by respondents' "housing" program to the additional punitive sentence of homelessness and inability to remain living within the OIN sovereign territory. Petitioner Danielle is living that sentence today. Petitioners' liberties to be secure in their homes are severely restrained and denied by respondents' 'housing' program.

There is imminent and ever-present threat that the respondents will do to the other petitioners what they did to petitioner Danielle Patterson, driving petitioners homeless from the OIN territory. The sanctions and restraints upon the liberties of petitioners caused by respondents' 'housing' program are not shared by the general membership.

The respondents' 'housing' program is a Bill of Attainder both in its purposeful structure to leave petitioners and only petitioners homeless and banished and as applied to petitioners, and as such, is in violation of 1302(9) of the ICRA. By definition, and by the clear intent of Congress, a Bill of Attainder is in and of itself an 'unreasonable restraint upon liberty' sufficient to trigger habeas corpus review under ICRA. The respondents' constructive banishment of the petitioners is in violation of the *ICRA.* Accord, *Poodry*, supra. This politically-motivated revenge is precisely what Congress intended to vest the U.S. Courts with jurisdiction to address.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Second Circuit Is In Direct Conflict With The Express Unequivocal Provisions of ICRA, and with Decisions of this Court Regarding Bills of Attainder, and with Established Law in Other Circuits.

The Indian Civil Rights Act of 1968 ("ICRA") clearly, unambiguously and unequivocally states: "*No Indian Tribe in exercising powers of self-government shall—(9) pass* ***any*** *bill of attainder or ex post facto law.*" § 1302. Bills of attainder were used in England during the sixteenth century to punish citizens for attempting the overthrow of the government.

The U.S. Supreme Court has defined bills of attainder as:

> ... legislative acts, ***no matter what their form***, that apply either to named individuals or to easily ascertainable members of a group in such a way as to ***inflict punishment*** on them without judicial trial. (emphasis added)
> *United States v. Lovett*, 328 U.S. 303, 315 (1945).

ICRA imposes "certain restrictions upon tribal governments, similar, but not identical to, the restrictions contained in the Bill of Rights and made applicable to states pursuant to the Fourteenth Amendment" to the United States Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978).

The authority of the US Congress to adopt the ICRA is not in question and never has been, since sovereignty of Indian nations is not absolute. The status of Indians as 'wards' of the US Federal Government has been confirmed and re-affirmed throughout the history of relations between the US Government and the American indigenous Peoples. *US v Kagama*, 118 US 375 (1886.)

When it enacted the ICRA in 1968, Congress knew that the Bill of Attainder Clause in the Bill of Rights serves as an important "*bulwark against tyranny*". *United States v. Brown*, 381 U.S. 437, 443 (1965).

Bills of Attainder are so repugnant that they are specifically and explicitly prohibited by the Bill of Rights.

> While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence,

the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply--trial by legislature.
U.S. v. Brown, 381 U.S. 437, 442 (1965.)

In 1810, Chief Justice Marshall, speaking for the Court in Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162, stated that '(a) bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.' This means, of course, that what were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.
Ibid at 447

Congress, being likewise repulsed by bills of attainder, included a clear, specific and explicit prohibition against *any* bills of attainder when it enacted the ICRA in 1968. Congress also specifically provided, at 25 U.S.C. §1303 of ICRA, that victims of arbitrary acts on the part of tribal governments have the right to seek review by habeas corpus: "*The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.*"

> The only available federal causes of action under which an individual can assert a violation of section 1302 are habeas petitions under section 1303. *See id.* at 66-67, 98 S.Ct. at 1681-82; 25 U.S.C. § 1303. [FN7] In other words, it is the Supreme Court's opinion that, ***other than for situations under which habeas relief is applicable***, the tribal courts can be adequate adjudicators of civil rights violations under section 1302. [emphasis added]
>
> *Santa Ynez Band of Mission Indians v. Torres,* 262 F.Supp.2d 1038, *1044, (C.D.Cal.,2002)

The Second Circuit cited *Poodry, supra*, saying "*if the district court lacks subject matter jurisdiction to entertain the applications for writs of habeas corpus, the petitioners have no remedy whatsoever.*" Ibid. 85. Such is the case in this matter.

Second Circuit Court of Appeals also noted in *Poodry*

> *Santa Clara obviously does not speak directly to the scope of Title I's habeas provision, which was a matter not raised in that case.* While our consideration of the instant case is necessarily informed by Santa Clara Pueblo's discussion of the tension between individual rights and tribal autonomy, *Santa Clara Pueblo does not resolve the jurisdictional inquiry here presented; whether the ICRA's habeas provision permits federal court review of the banishment orders.* Ibid. at 887 [emphasis]

Petitioners seek *habeas corpus* protection in the U.S. Courts pursuant to ICRA against the respondents' 'housing' program. Only petitioners will suffer the *irreparable harm* in the form of lingering, never ending severe restraints upon petitioners' liberties and loss of housing in direct violation of

the prohibitions and protections against bills of attainder expressly contained in the ICRA.

> The threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury, and satisfies the first prong of the test for preliminary injunctive relief."
> *McNeill v. New York City Housing Authority*, 719 F.Supp. 233, 254 (S.D.N.Y.,1989)

By definition, "*irreparable harm*" means that type of injury for which a monetary award would fail to be adequate compensation. *See Jackson Dairy,* 596 F.2d at 72; *Stewart B. McKinney Found. v. Town Plan and Zoning Commission of Town of Fairfield,* 790 F.Supp. 1197, 1208 (D.Ct.1992). See *Connecticut Hosp. v. City of New London,* 129 F.Supp.2d 123, 128 (D.Ct.,2001)

> The affidavits in this case ... show that there is a substantial danger that these petitioners may lose their present housing if aid is cut off prior to the fair hearing decision. For those recipients whose aid is wrongly reduced that is, who are able to persuade the hearing examiner that the shelter allowance should not be reduced or should not be reduced to the extent proposed the possible harm is clearly irreparable. *A lost home can rarely be regained in the present New York market, and homelessness cannot be adequately compensated by retroactive monetary payments.*
> *Viverito v. Smith,* 421 F.Supp.1305,1311(D.C.N.Y. 1976)

Petitioners presented to the district court approximately twenty (20) undisputed and unrefuted affidavits that unless this court intervenes, the petitioners will be rendered homeless and unable to live on the Territory.

"The petitioners and the other members of the class would be irreparably harmed if the relief requested were not granted. Absent this court's ... order, they would be obliged to cope with the elements--rain, snow, wind and freezing temperatures." *Hilton v. New Haven,* Superior Court, judicial district of New Haven, Docket No. 8904-3165 (December 27, 1989).

Hilton v. City of New Haven 233 Conn. 701, 709-710, 661 A.2d 973,977 (Conn.,1995)

Federal Courts when confronted with issues of whether litigants have been afforded due process of law in tribal courts have expressly held that basic due process guarantees must be adhered to in the tribal forum:

A federal court must also reject a tribal judgment if the respondent was not afforded due process of law.... The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments, we must ask no less of Native American tribes.

Wilson v. Marchington, 127 F. 2d 805, 811 (9th Cir. 1997)

In holding that the petitioners were not required to exhaust their tribal remedies before filing their ICRA claims, the Eighth Circuit stated:

... to require the appellees to resort to tribal remedies would be a futile gesture and would cause irreparable harm. There is sufficient evidence to support the District Court's conclusion that appellees could not receive a fair hearing from the Tribal Council ... and the Tribal Council was the supreme judicial authority.

Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 101 (8th Cir. 1976)

Thus, Congress, using its plenary powers over Indian tribes, expressly, specifically and unequivocally provided that the U.S. Courts have subject matter jurisdiction over petitioners' challenge of respondents' housing program as a being a bill of attainder as applied to petitioners. The U.S. Courts have jurisdiction to grant *habeas corpus* releasing petitioners from the lingering unreasonable restraints upon petitioners' liberties caused by the housing program.

2. This case has significant ramifications in Indian Country, with substantial continuing importance due to a conflict among Circuits over the jurisdiction of Federal Courts as well as division of the standard for determining the fact sensitive question of whether legislation is a bill of attainder resulting in non-uniform application of Federal Law and Rights.

This case presents the cleanest circuit split imaginable. In addition to the pressing general need to resolve a continuing and expanding split, this case itself presents a compelling vehicle in which to address the question presented. The question whether the ICRA vests the U.S. Courts with subject matter jurisdiction is of great practical importance. As an initial matter, the fact that several different federal courts reach direct contrary conclusions on the same question of law highlights the confusion among the circuits and the need for a uniform law on this subject.

If the U.S. Courts do no have subject matter jurisdiction to determine whether challenged legislation is in fact a bill of attainder in violation of ICRA, then the rights of victims of bills of attainder in Indian country will be significantly undermined for there will be absolutely no forum for victims to obtain enforcement of the rights which Congress intended to bestow. These cases will continue to

arise and will continue to result in the inconsistent administration of justice due to the circuit split.

Directly contrary to the Second Circuit, the Federal Courts at least two other Districts - Arizona District and Central District of California - had absolutely NO difficulty in enforcing the express provisions of ICRA vesting U.S. Courts with subject matter jurisdiction to grant habeas corpus relief to a victim of a bill of attainder in order to release such victim from the unreasonable restraints of such bill of attainder, whatever nature those restraints might be.

In *Dodge v. Nakai*, D.C.Ariz. 1969, 298 F.Supp. 26, a tribal council order excluding from the reservation the program director of a non-profit legal service corporation *was found to constitute an unlawful bill of attainder in violation of ICRA.*

> The factors to be considered in determining whether a legislative act imposes 'punishment' on a person are set forth in Kennedy v. Mendoza- Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). Upon consideration of those factors, the Court concludes that the exclusion of Mitchell from the Navajo Reservation constitutes 'punishment' as that term has been interpreted by the Courts.
>
> *Dodge v. Nakai*, 298 F.Supp. 26, 34 (D.C.Ariz. 1969.)

In *Santa Ynez Band of Mission Indians v. Torres*, 262 F.Supp.2d 1038, 1047, (C.D.Cal., 2002), the Central District of California also interpreted ICRA as vesting the U.S. Courts with subject matter jurisdiction over bills of attainder:

> Therefore, the Court holds that the ICRA is an applicable defense to this action. Accordingly, Torres has submitted evidence that creates a material issue of fact surrounding the passage of the ordinance excluding him from the Reservation, in support of his argument that the ordinance constitutes a deprivation

of property without due process, and that the **ordinance amounts to an unlawful bill of attainder**. In that regard, the Tribe has not satisfied its burden on summary judgment, even assuming the Tribe can cure its evidentiary defects noted above, and its motion must fail. [emphasis added]

Santa Ynez Band of Mission Indians v. Torres, 262 F.Supp.2d 1038, 1047, (C.D.Cal., 2002)

3. The Court of Appeals and the District Court Rewrote ICRA and Rendered a Nullity throughout Indian Country the Clear, Express and Unequivocal Protections Against Any Bills of Attainder being enacted by any Indian Nation

It is settled law that in construing a statute, the court must follow its plain meaning. 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 46.01 (5th ed.1992) (hereinafter Sutherland). "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470 (1917).

"The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135-36, (1991) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). It is settled law that "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti v. U.S.*, 242 U.S. 470, at 485 (1917). The courts do not have authority to rewrite ICRA in a manner that Congress did not intend. See, e.g., *Heckler v.*

Mathews, 465 U.S. 728, 741-742 (1984) ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *, or judicially rewriting it.") (citation and internal quotation marks omitted).

The Second Circuit violated the Act's plain meaning by failing and refusing to enforce and apply Act as plainly, clearly, unambiguously and unequivocally written that "No Indian Tribe in exercising powers of self-government shall—(9) pass any bill of attainder or ex post facto law." 25 U.S.C. §1302(9)

The District Court and the Court of Appeals below, by improperly refusing to apply and enforce ICRA as plainly written and intended by Congress, have rewritten this significant piece of legislation out of existence, rendering it a nullity. This interpretation of ICRA would deny victims of bills of attainder access to the U.S. Courts for relief as directed by ICRA.

The decisions appealed from failed to address the effects of the punishment caused by bills of attainder that continue even today. The panel's decision also directly conflicts with the decisions in Poodry v. Tonawanda Band of Seneca Indians, supra. and Shenandoah v. United States Department of Interior, Halbritter et al, supra. and contradicts the purpose and intent of the bill of attainder clause of ICRA:

> Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This history, extending over more than three years, indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other,

avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report 11.

In *Harvey v. State of N.D.*, 526 F .2d 840, 841 (8th Cir.1976) held that, in the context of a petition for federal habeas corpus filed by a state prisoner, the custody requirement has been equated with significant restraint on liberty. While the Supreme Court has not attempted to define with exactness the liberty guaranteed by the Constitution, it has recognized that

> **[liberty] denotes not merely freedom from bodily restraint but also the right of the individual to** contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, **establish a home** and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.
>
> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).
>
> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-70, (1978)

4. Bills of Attainder "Detain" Their Victims Even Without, or Beyond the End of, Actual Physical Custody or Incarceration.

The punitive effects of a bill of attainder never end. Because of the lingering, never ending restraints upon liberties caused by *any* bill of attainder, Congress determined that '*any*' bill of attainder created sufficient lingering restraints upon liberties to constitute 'custody' or 'detention'

for purpose of vesting the US Courts with subject matter jurisdiction to grant *habeas corpus* relief under ICRA.

At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bill of pains and penalties. Article I, Section 9, Clause 3 of the Constitution prohibits these lesser penalties as well as those of imposing death. *Cummings v. Missouri*, 71 U.S. 277, 323 (1867). Historically used in England in times of rebellion or "violent political excitements", bills of pains and penalties commonly imposed imprisonment, banishment, and *the punitive confiscation of property*. See, *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977). In this country, the list of punishments has been expanded to include legislative bars to participate by individuals or groups in specific employments or professions. See., e.g., *United States v. Brown*, 381 U.S. 437 (1965), Communist Party members were barred from offices in labor union); *United States v. Lovett*, 381 U.S. (1946) (salaries terminated to three named Government employees).

The Supreme Court in *Santa Clara Pueblo* made the following observation regarding the legislative history underlying 25 U.S.C. §1303 (right of habeas corpus relief):

> This history, extending over more than three years, indicates that Congress' provision for *habeas corpus* relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments on one hand, and on the other, avoiding undue or precipitous interference in the affairs of the Indian people. Ibid.

As originally proposed, ICRA would have provided for a trial *de novo* in the district court of all tribal 'convictions'. The ultimate change to habeas corpus as the only procedure for review was intended to limit the inquiry to deciding whether an accused's Constitutional rights were

violated, not to exclude certain criminal cases from review altogether. See, *Santa Clara Pueblo v. Martinez*, Ibid. 76 (dissenting opinion) (quoting from the Senate Summary Report) The Supreme Court also specifically recognized in *Santa Clara Pueblo* that ICRA was passed to modify cases such as *Talton v. Mayes*, 163 U.S. 376 (1896) which had held that the Fifth Amendment did not affect tribal self-government:

> As the court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of self-government which tribes otherwise possess (citations omitted). Title I of the ICRA, 25 U.S.C. §§1301-1303, represents an exercise of that authority. In 25 U.S.C. §1302, Congress acted to modify the effect of Talton and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and Fourteenth Amendment.
> Ibid.

Over 25 years ago, the Ninth Circuit recognized the remedial or curative purpose of habeas corpus in the context of Indian criminal proceedings in *Settler v. Lameer*, 419 F.2d 1311 (9th Cir. 1969) and *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969),cert.denied 398 U.S. 903 (1970).

In fact, the Supreme Court referenced *Settler v. Yakima*, supra, in *Santa Clara Pueblo* as an example of a situation where a writ of habeas corpus would be available "to a person detained by a [tribal] court in violation of the Constitution." 436 U.S. at 56, n.7.

It is respectfully submitted that bills of attainder of any kind or nature by their very definition of legislative infliction of additional punishment such as seizure, forfeiture and confiscation of private homes is typical of "*the most serious abuses of tribal power [which occur] in the administration of criminal justice*", *which Congress sought*

to remedy by enacting the ICRA". *Santa Clara Pueblo v. Martinez*, Ibid. at 71.

The Second Circuit recognized the expansive jurisdiction of the United States Courts under the ICRA in *Poodry v Tonowanda*, 85 F.3d 874 (1995). "*We begin with three decades of case law rejecting the notion that a writ of habeas corpus ... is a formalistic remedy whose availability is strictly limited to persons in actual custody.*" Id, at 893.

Poodry also quoted from the case of *Jones v Cunningham* as follows: "*It [habeas corpus] is not now and never has been a static narrow, formalistic remedy: its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.*" Id.894, Jones, 371 U.S. 236, 240. Actual physical custody is not a jurisdictional prerequisite for federal habeas review under Indian Civil Rights Act of 1968. *Poodry v. Tonawanda Band of Seneca Indians*, C.A.2 (N.Y.) 1996, 85 F.3d 874, cert.denied 519 U.S. 1041.

5. The District Court and the Court of Appeal Ignored Numerous Questions of Material Fact and Applied the Wrong Legal Standard When Summarily Dismissing Petitioners' ICRA Claims that Respondents' Housing Program was a Bill of Attainder as applied to petitioners

The determination of whether legislation constitutes an impermissible bill of attainder is *very fact dependent* and *requires an examination* under the three-pronged test.

The material questions of fact cannot be decided in a summary manner without any hearing or record being created going to the proofs to determine whether respondents' 'housing program' is a 'textbook' bill of attainder *as applied* to petitioners: (a) *historically*, the seizure and forfeiture of homes (whether estates or mobile homes) has been punishment historically inflicted by bills of attainder; (b)*functionally*, *only the petitioners* are identified

[using the label 'members-not-in-good-standing'] for suffering the sentence under the 'housing program' of homelessness and inability to remain living on the Nation's sovereign Territory; and (c) ***motivationally***, the respondents' own admission indisputably confirms the real purpose of respondents' housing ordinance was to 'rid' the Territory of the petitioners, which purpose the panel's decision is permitting.

In its seven page summary decision, the panel completely failed to engage in any analysis supporting its legal conclusion that the 'ordinance' was not a bill of attainder. The Second Circuit also failed to examine the facts or make any findings as to whether the total cumulative effect of respondents' 'housing program' upon only the petitioners was a bill of attainder.

In *Trop v. Dulles*, 356 U.S. 86 (1958), supra, this Court disposed of semantics as follows:

> How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them. Manifestly the issue of whether [the law in question] is a penal law cannot be thus determined. 356 U.S. at 94.

Not only is the present matter is directly on point with *Dodge v Nakai*, supra., but it is also consistent with *Davis v Kinloch*, 752 S.W. 2d 420 (Mo. Ct. App. 1988) in which the court found the legislative act of respondents sending a letter revoking the petitioner's license to continue operating his restaurant constituted a prohibited bill of attainder.

The rights and protections under ICRA must be examined in accordance with the analysis and holdings regarding bills of attainder such as *McMullen v United States of America*, 953 F.2d 761 (2nd Circuit 1992) in which the court specifically found that "a *Supplementary Extradition*

Treaty is a bill of attainder as applied to McMullen". Ibid 764

> [The district court] held that the three requisites had been satisfied, since the Supplemental Extradition Treaty: (1) specified the affected parties; (2) imposed punishment, and (3) failed to provide the protection of judicial process. [Selective Service] at 847,; McMullen, 769 F. Supp. 1278, 1284 (S.D.N.Y. 1991). We agree. Ibid 765.

Other circuits have recognized the broader scope of a writ of *habeas corpus* to protect persons in circumstances similar to those suffered by Petitioners in this case. See *Dry v. CFR Court of Indian Offenses for Choctaw Nation*, 168 F.3d 1207 (10th Cir., 1999.); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969). Those courts held that the writ of habeas corpus provides relief where a person is subjected to "severe restraints on their liberty," and when the restraint is "not shared by the public generally." *Hensley v. Municipal Court*, 401 U.S. 345, 351 (1973); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); *Dry*, 160 F.3d at 1207.

The divergent results reached by several federal courts in interpreting the protections under ICRA against bills of attainder runs retrograde to the goal of uniform federal law and undermines the fair administration of justice.

CONCLUSION

For all of the foregoing reasons, the petitioners respectfully request that this Court grant their petition.

December 9, 2004

Respectfully submitted,
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In The
Supreme Court of the United States

APPENDICES

United States District Court,
N.D. New York.
Maisie SHENANDOAH, et al., Plaintiffs,
v.
Arthur Raymond HALBRITTER, et al., Defendants
No. 02-CV-1430.
Aug. 8, 2003.

Residents of Indian reservation brought action seeking habeas corpus relief under Indian Civil Rights Act (ICRA), alleging that tribe's housing ordinance was used to retaliate against the residents for their resistance against tribal leadership. Tribe moved to dismiss and residents cross-moved for preliminary injunctive relief. The District Court, Mordue, J., held that Court lacked subject matter jurisdiction.
Dismissed.

Donald R. Daines, Esq., Princeton, NJ, for Plaintiffs.; MacKenzie Hughes, L.L.P. (David M. Garber, Esq., of Counsel), Syracuse, NY, Zuckerman Spaeder, L.L.P. (William W. Taylor, Esq., Michael R. Smith, Esq., David A. Reiser, Esq., Of Counsel), Washington, DC, for Defendants.

MEMORANDUM-DECISION AND ORDER

MORDUE, District Judge.

I. INTRODUCTION

Plaintiffs, nearly all of whom claim to be but only some of whom actually are members of the Oneida Indian Nation of New York, sue under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq.*. Plaintiffs seek the only remedy available under the statute--a writ of habeas corpus--in an effort to avoid compliance with an allegedly unlawful housing ordinance enacted by the Nation and/or the consequences of the Nation's enforcement of said ordinance against them. Presently before the Court is defendants' motion to dismiss

the complaint for lack of subject matter jurisdiction and plaintiffs' cross-motion for preliminary injunctive relief. Since the filing of the afore-referenced motions, plaintiffs have also made a letter application for temporary emergency relief and a motion for reconsideration of this Court's oral denial of said application. Neither of these latter motions was filed in accordance with the Local Rules of this Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

In spite of various and highly contentious legal battles disputing the fact, defendant Raymond Halbritter is recognized by the federal government as the official representative of the Oneida Indian Nation of New York. *Shenandoah v. U.S. Dep't of Interior,* 159 F.3d 708, 710 (2d Cir.1998). Plaintiffs state that they have had a long-*281 standing relationship of ill-will with defendant Halbritter and those claiming authority through him. Plaintiffs assert that Halbritter, along with the other named defendants, are using power they obtained via illegitimate means over the Oneida Nation to arrest, imprison and restrain the freedom of plaintiffs as well as to seize and destroy plaintiffs' private property without providing compensation in violation of the ICRA. Specifically, plaintiffs allege that to retaliate against them for exercising their right of free speech, religious freedom and traditional Native American beliefs and practices in actively resisting the leadership of defendant Halbritter and those who derive authority from him, defendants concocted an unconstitutional "bill of attainder" disguised as a housing ordinance.

The ordinance, No. 00-03, requires the Oneida Nation's Commissioner of Public Safety to: 1) inspect all homes located on Territory Road, a portion of Oneida Nation lands known as the "32 acres," for compliance with the standards set forth in the National Building Code; 2) require repair or rehabilitation of homes not in compliance with the Code if repair or rehabilitation is possible; and 3) remove and/or demolish structures which cannot be repaired or

rehabilitated. The Nation is required by the terms of the ordinance to arrange interim or permanent housing for residents of Territory Road whose homes were found to be unsuitable for continued habitation. Plaintiffs allege that the housing ordinance, which they refer to as an illegal "bill of attainder," was enacted with a discriminatory purpose and is designed to remove them forcibly from their homes in violation of their civil rights.

The housing ordinance at issue was upheld in September 2001, by Chief Judge Stewart F. Hancock, Jr. of the Oneida Indian Nation Trial Court as valid under the ICRA and as a reasonable exercise of the Oneida Indian Nation's power of self-government under *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Judge Hancock's decision was affirmed by the Oneida Nation Appellate Court in January 2002. The ordinance was enacted "as part of the Nation's continuing program to eliminate dilapidated and unsafe housing on Territory Road and to further the goal of providing a decent home and suitable living environment for persons residing on Nation land." *In re Application of Arthur F. Pierce, Case No. 01-014-CI, Oneida Indian Nation Trial Court* (Aug. 8, 2002, Hancock, Jr., J.). After passage of the ordinance, efforts by the Nation's Public Safety Commissioner to commence the inspection process were thwarted by plaintiffs who either left their homes or refused to permit entry by inspectors at the designated time for inspections.

Plaintiffs' complaint highlights the case of Danielle Patterson who previously resided in a trailer on the "32 acres" with her three minor children. In November 2001, Ms. Patterson was arrested and then released after she violently resisted compliance with an order of Judge Hancock permitting inspection of her home. When Nation police officers attempted to enter her home with the court order against her wishes, Patterson struck and kicked one of the officers. According to the Notice and Order of Condemnation, Demolition and Removal later issued by Arthur Pierce, the

Oneida Nation Public Safety Commissioner, which ultimately resulted in destruction of Patterson's home, the trailer was "badly deteriorated" and "in such an overall dilapidated condition that [was] not fit for human habitation." Among other things, the Notice stated that the trailer had no foundation, no heating system, inadequate supports, boarded windows, missing and broken doors, holes in the floor, holes in the ceiling and a kitchen sink not connected to a drain. Plaintiffs allege that Ms. Patterson attempted to remedy the unsafe and *282 unsuitable conditions by having a foundation and/or a furnace installed. However, Pierce found that the trailer was "unsafe and dangerous" and the violations could not be corrected or the trailer rehabilitated. Plaintiff appealed this Notice to the Oneida Nation Tribal Court, but did not challenge the factual findings of Commissioner Pierce and thereafter refused to participate in any hearings or other proceedings. [FN1] Judge Hancock affirmed the administrative Notice and Order of Demolition in August 2002, after finding that it was fully supported by the evidence and was not arbitrary, capricious or otherwise unlawful. *See In re Application of Arthur F. Pierce, supra.*

> FN1. It is notable that following issuance of the Order of Demolition for her home, Gary Gordon, the Nation's Housing Director wrote to Ms. Patterson and offered her a home in the Nation's Village of the White Pines Development less than a half mile from the location of her condemned trailer. According to Gordon, the home was less than ten years old, had recently been refurbished and was in excellent condition. The house had four bedrooms, two bathrooms, an attached garage and a full basement with a refrigerator, gas stove, free water and sewer service along with available hook-ups for cable television and a washer and dryer. Gordon advised Patterson that the rent for the home would be prorated based on her

> income. Patterson rejected the offer of substitute housing as reported by the Nation's attorney at the appellate hearing before Judge Hancock in June 2002.

On October 18, 2002, Patterson was rearrested and released three days later for refusing to appear in court and stand trial on the criminal charges stemming from the altercation with Nation police officers as they attempted to enforce the lawful inspection order for her home. Patterson pled guilty to one count of criminal contempt. Judge Richard Simons sentenced Patterson to "time served," released her unconditionally and informed her that she was "free to go." On October 23, 2002, Patterson's home was demolished in accordance with the commissioner's order.

Plaintiffs allege that Danielle Patterson and her children are now homeless since she refused the Nation's offer of substitute housing and that the remaining plaintiffs may soon be similarly situated due to enforcement of the alleged discriminatory housing ordinance. Plaintiffs assert that defendants--an eclectic group of lawyers, judges, police officers, sheriffs and Oneida Nation officials--have conspired and will continue to conspire to violate their civil rights by implementing the alleged discriminatory housing ordinance. Plaintiffs filed their complaint along with an *ex parte* application for a temporary restraining order ("TRO") on November 13, 2002. In the complaint, plaintiffs allege that the action is brought pursuant to the ICRA. They seek writs of habeas corpus together with injunctive relief enjoining defendants from further acting under the authority of the housing ordinance and relieving plaintiffs from further obligation to comply with administrative or court orders relating to the housing ordinance. Although plaintiffs reference defendants' alleged repressive control over Oneida Nation affairs and denial of "essential services" to them in retaliation for their refusal to abandon their religious, spiritual, societal and government traditions, no facts in support of these allegations appear in the complaint filed

herein. Indeed, the complaint clearly states that its "narrow focus" is to petition the Court for writs of habeas corpus and injunctive relief to prohibit defendants from forcibly evicting plaintiffs from their homes, imprisoning them, demolishing their homes and leaving them homeless and unable to reside on the "32 acres." [FN2]

> FN2. In an apparent attempt to broaden the factual bases for plaintiffs' claims and bring the complaint within the purview of federal court jurisdiction, plaintiffs' counsel argues in opposition to the motion to dismiss that defendants have also used their illegitimate power to 1) "convict" plaintiffs of "treason" without any "trial;" 2) label plaintiffs as "dissidents" and target them for punitive treatment; 3) remove plaintiffs as "good standing" members of the Oneida Indian Nation and reclassify them as members "not-in-good-standing;" and 4) strip plaintiffs of Tribal benefits and entitlements. To wit, plaintiffs' counsel asserts that many plaintiffs were "convicted" by defendants of treason and made members "not-in-good-standing" following a 1993 press conference at which plaintiffs spoke out against defendants. Further, their counsel avers that some plaintiffs were "convicted" of treason by defendants and made members "not-in-good-standing" following a 1995 peace march during which many of the plaintiffs protested against defendants. In support of these allegations, none of which appear in the complaint, some plaintiffs submitted affidavits stating or suggesting that defendants have: (1) "removed' plaintiffs' "voices" thereby denying them any right to participate in the Nation's government or rule making; (2) socially ostracized and isolated plaintiffs by

means of threats issued to other Oneida members who sought to maintain contact with plaintiffs; (3) barred plaintiffs from all Nation facilities including those providing health and recreational services; (4) barred plaintiffs from the Nation's Longhouse, where traditional religious ceremonies and political meetings are held; (5) threatened to and/or have actually arrested plaintiffs and members of plaintiffs' families for "trespassing" on Nation facilities including the casino located outside of the Nation's sovereign territory; (6) banned plaintiffs from all Nation religious and cultural ceremonies and social events; (7) denied plaintiffs health benefits and coverage, heat and heating assistance, water, sewage and other vital services offered through the Nation; (8) seized and demolished privately owned vehicles, and (9) seized and confiscated plaintiffs' share of quarterly distribution payments (including bolts of cloth) that are made by the United States to the Oneida Nation for distribution by the Nation to each adult. Plaintiffs' counsel argues that the fact that defendants did impose these alleged actions upon plaintiffs is "directly relevant to the court's analysis as to whether the 'real' purpose behind defendants' latest so-called 'housing' ordinance is to inflict additional punishment upon plaintiffs in the form of forced eviction, confiscation, forfeiture and destruction of their homes and property and/or effectuate actual physical banishment from the Sovereign Territory through the refusal to reimburse plaintiffs for the value of the private home and denial of any assistance made available by defendants to others whom defendants want to be able to remain living on the Territory."

On the same day that plaintiffs filed their complaint, this Court issued a letter *283 order denying plaintiff's application for a TRO on the grounds that "possible future actions of defendants as alleged by plaintiffs do not demonstrate the present existence of a restraint on liberty sufficient to support habeas corpus." As a further matter, this Court advised counsel for plaintiffs that "there is a significant question regarding whether there is any basis for district court jurisdiction under [the ICRA], or, upon review, under any other authority cited by plaintiffs." Based thereupon, the Court declined to sign plaintiffs' order to show cause and returned the moving papers to plaintiffs.

Defendants thereafter moved to dismiss the complaint on the grounds that this Court lacks subject matter jurisdiction in this case based on plaintiffs' failure to allege and their inability to prove that any of them are in actual custody as required by the habeas corpus statute upon which this action is premised. Plaintiffs cross-moved for a preliminary injunction. On May 8, 2003, plaintiffs' counsel wrote to the Court and requested emergency relief by way of a temporary injunction pending determination of the parties' respective motions. To wit, counsel for plaintiffs advised the Court that plaintiffs were then subject to a tribal court order compelling their attendance on May 12, 2003, before Judge Hancock to show cause why defendant Pierce should not be authorized to enter and inspect their homes pursuant to the challenged housing ordinance. Although *284 plaintiffs had not utilized the proper procedure for either an application for TRO or regular motion, the Court elected to conduct a telephone conference with all counsel given the nature of the relief requested on May 9, 2003. During the telephone conference, the Court reminded counsel for plaintiffs of the content of the Court's November 2002, letter order denying the application for a TRO and advised counsel once again that there was a serious question concerning this Court's jurisdiction to act on plaintiffs' complaint. [FN3] Based thereupon, the Court denied orally plaintiffs' letter application for emergency temporary relief. In the absence of federal

court jurisdiction--an obstacle brought to the attention of plaintiffs on the day their lawsuit was filed and subsequently during the telephone conference in May 2003--it should have been clear to plaintiffs that their remedy, if any, in challenging enforcement of the housing ordinance lay in those remedies available through the Oneida Nation Trial and Appellate Courts. After fully reviewing the submissions of the parties, the Court answers the "serious question" it posed concerning jurisdiction in this case against plaintiffs. Because this Court clearly lacks subject matter jurisdiction to entertain plaintiffs' claims as more fully discussed below, their complaint must be dismissed.

> FN3. Prior to the telephone conference, plaintiffs' counsel had brought to the attention of the Court a previous case involving some of the same parties wherein then District Court Judge Rosemary Pooler issued an oral order restraining the parties from acting to disturb the *status quo* pending her review of the merits of the parties cross-motions for dismissal and injunctive relief. In that case, plaintiffs' habeas corpus claim-- premised on many of the same factual allegations as are set forth here--was dismissed for lack of subject matter jurisdiction because of failure to allege a sufficiently severe restraint on their liberties. *See*
>
> *Shenandoah v. United States Dep't of Interior,* 1997 WL 214947, at *8 (N.D.N.Y.1997). Judge Pooler's decision was thereafter affirmed by the Second Circuit. *See Shenandoah,* 159 F.3d at 714.

III. DISCUSSION

A. *Applicable Standards of Review*

The standards applicable to motions to dismiss are well-settled. On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept the allegations of the complaint as true, and draw all reasonable inferences in favor of the nonmoving party. *See Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir.1998); *Gant v. Wallingford Bd. of Educ.,* 69 F.3d 669, 673 (2d Cir.1995). In addition, the Court may not dismiss the complaint unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nettis v. Levitt,* 241 F.3d 186, 191 (2d Cir.2001) (quotation omitted). Therefore, the issue before the Court on such a motion "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *King v. Simpson,* 189 F.3d 284, 287 (2d Cir.1999) (quoting *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995)).

[1] [2] When a defendant moves to dismiss for lack of subject matter jurisdiction, however, a different standard is applied. In considering a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), federal courts "need not accept as true contested jurisdictional allegations." *Jarvis v. Cardillo,* Civil Case No. 98-5793, 1999 WL 187205, at * 2 (S.D.N.Y. April 5, 1999). Rather, a court may resolve disputed jurisdictional facts by referring to evidence outside the pleadings. *See Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir.2000); *285 *Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 932 (2d Cir.1998). As the party "seeking to invoke the subject matter jurisdiction of the district court," plaintiff bears the burden of demonstrating that there is subject matter jurisdiction in this case. *Scelsa v. City Univ. of New York,* 76 F.3d 37, 40 (2d Cir.1996).

B. *Writs of Habeas Corpus*

[3] Although Title I of the ICRA lists a number of substantive rights afforded to individuals that serve to restrict the power

of tribal governments, *see* 25 U.S.C. § 1302, Title I "does not establish or imply a federal civil cause of action to remedy violations of § 1302." *See Shenandoah,* 159 F.3d at 713 (citing *Santa Clara Pueblo,* 436 U.S. at 72, 98 S.Ct. 1670); *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 884 (2d Cir.), *cert. denied,* 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996)). Rather, "Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302: § 1303 makes available to any person '[t]he privilege of the writ of habeas corpus ..., in a court of the United States, to test the legality of his detention by order of an Indian tribe.' " *Id.* ((quoting *Poodry,* 85 F.3d at 882) (quoting 25 U.S.C. § 1303)). "[S]ection 1303 was intended by Congress to have no broader reach than the cognate statutory provisions governing collateral review of state and federal action," *id.* at 714 (quoting *Poodry,* 85 F.3d at 901 (Jacobs, J., dissenting) and 879-80 (majority opinion)), and thus "plaintiffs must allege that defendants posed a 'severe actual or potential restraint on [their] liberty.' " *Id.*

Regarding plaintiffs' habeas claim, defendants assert that since plaintiffs have failed to allege or submit evidence that they are or were in actual custody at the time the lawsuit was commenced, this Court lacks subject matter jurisdiction to consider it on the merits. Plaintiffs contend that they need not allege or demonstrate that they are in actual custody since the liberties they allege have been or will be restrained by defendants are sufficient to bring plaintiffs within ICRA's habeas provision. Plaintiffs argue correctly that habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and in the case of tribal affairs, permanent banishment. *Poodry,* 85 F.3d at 893-94, 897 (collecting cases). In *Poodry,* the petitioners were "convicted [ ] of treason," sentenced to "permanent banishment," and "stripped of ... Indian citizenship;" their names were "removed from the Tribal rolls" and they "permanently [lost] any and all rights afforded [tribal]

members." *Id.* at 876, 878. Although petitioners there were not actually ejected from the reservation, a divided panel of the Second Circuit held that these deprivations of liberty, including a sentence of "permanent banishment," were sufficiently severe to bring petitioners within the ICRA's habeas provision. *Id.*

In contrast, plaintiffs in the instant case have not alleged that they were banished from the Nation, deprived of tribal membership, formally convicted of any crime, or that defendants attempted in any way to remove them from Oneida territory. The complaint and factual evidence submitted by plaintiffs in opposition to the motion to dismiss alleges and establishes that plaintiffs' habeas claims are premised upon eviction of one plaintiff, potential eviction of others, destruction of property of one plaintiff and potential further destruction of property of other plaintiffs. Indeed, plaintiffs cannot allege with certainty what further actions, if any, defendants will take in enforcing the housing ordinance against the homes of additional plaintiffs since the inspection, condemnation and demolition process has been *286 stayed pending disposition of plaintiffs' appeals in the Oneida Nation Appellate Court. There are no allegations suggesting or facts establishing that defendants attempted to remove plaintiffs from Oneida Nation lands. Rather, the actions challenged by plaintiffs solely concern defendants attempts to evict plaintiffs from unsafe housing in the "32 acres" and relocate them to suitable housing within the Oneida Nation territory. The "crimes" plaintiffs' counsel claims defendants have convicted plaintiffs of is being "dissidents," but unlike *Poodry,* there have been no official or formal proceedings taken against plaintiffs insofar as charging them with actual crimes, affecting their tribal membership or banishing them from Nation territory.

Insofar as allegations by various plaintiffs concerning retaliatory conduct by defendants such as withholding of housing and/or heating assistance, withholding of government distribution checks and confiscation of boats

and automobiles, and even the destruction or threatened destruction of their homes, it is clear that these alleged incidents concern economic restraints and/or personal property rather than actual liberty interests. As a further matter, the allegations which appear in affidavits filed by plaintiffs in opposition to defendants' motion concerning loss of various tribal privileges, loss of their "voices," and banishment from various Nation facilities and activities are precisely the same allegations found to be insufficient to trigger ICRA jurisdiction in the previous litigation between these parties. *See Shenandoah,* 159 F.3d at 715.

[4] [5] [6] Finally, plaintiffs' argument that the challenged housing ordinance is an *ex post facto* law or "bill of attainder" is unavailing. In the first instance, the housing ordinance fits into neither unlawful category cited by plaintiffs since it does not target individuals nor does it "punish" persons in the traditional prohibitive sense. [FN4] Secondly, even if the law was, as plaintiffs suggest, designed solely to discriminate against them and was "unconstitutional" in its enactment or enforcement, plaintiffs cite no authority nor has the Court found any to support the argument that such action by defendants would trigger habeas jurisdiction--the only federal jurisdiction available--under the ICRA in the absence of a custody violation or a substantial deprivation of liberty. Indian tribes are "distinct political entities" retaining inherent powers to manage internal tribal matters. *See Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16, 8 L.Ed. 25 (1831). Because tribal powers of self-government are "retained" and predate the federal Constitution, "those constitutional limitations that are by their terms or by implication framed as limitations on federal and state authority do not apply to tribal institutions exercising powers of self-government with respect to members *287 of the tribe or others within the tribe's jurisdiction." *Poodry,* 85 F.3d at 880-81. "Members of federally recognized Indian tribes are citizens of the United States and are therefore afforded constitutional protection against violations of individual rights by federal and state institutions, but

constitutional provisions limiting federal or state authority are of no force in constraining actions of tribal governments." *Id.* at 881 n. 7 (citing 8 U.S.C. § 1401(b))

> FN4. "A bill of attainder [is] 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.' " *Selective Serv. Sys. v. Minnesota PIRG,* 468 U.S. 841, 846-47, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)). It is clear that the housing ordinance at issue herein cannot be so described since it does not set forth standards for finding **individuals** guilty of anything, but rather, establishes minimum standards for housing located on Territory Road in the "32 acres." The housing ordinance does not contain a "punishment" provision against individuals, but rather establishes a procedure for inspecting suspected sub-standard housing, allowing repair or rehabilitation of the property if possible and condemning the property if necessary. As such, the housing ordinance is not an *ex post facto* law which declares previously legal conduct illegal and imposes punishment retroactively for past conduct.

[7] [8] The sole basis for enforcement of rights guaranteed by the ICRA is the habeas provision which requires proof of a custody violation or substantial deprivation of liberty--evidence of which is wholly absent from plaintiffs' complaint and submissions. The only plaintiff who is alleged to have ever been in actual custody of defendants is Danielle Patterson, but it is clear that the custody was limited in duration and related to alleged criminal conduct of plaintiff,

not any alleged violation of the challenged housing ordinance. Moreover, it is clear that Danielle Patterson is not now in custody and was not in custody at the time this action was commenced. Based thereupon, plaintiffs have not alleged a "severe actual or potential restraint on [their] liberty," *Poodry,* 85 F.3d at 880, and the complaint must be dismissed. [FN5] Based thereupon, the Court need not address defendants alternative arguments concerning plaintiffs' failure to exhaust administrative remedies prior to seeking habeas corpus relief [FN6] or plaintiffs' cross-motion for issuance of a preliminary injunction.

> FN5. To the extent that plaintiffs seek injunctive or other equitable relief in addition to writs of habeas corpus, these claims are also subject to dismissal. *See Santa Clara Pueblo,* 436 U.S. at 71, 98 S.Ct. 1670 (Section 1302 [of the ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either tribes or their officers based on the principle of sovereign tribal immunity). In this case, each of the named defendants is alleged to be either a member of the Oneida Nation or a non-member employed, appointed or authorized to act on behalf of the Nation and/or defendant Halbritter. Plaintiffs do not allege that any defendants acted as officers of any government other than the Nation or acted outside the authority vested or conferred by the Nation. As such, defendants, all of whom are alleged to be "officers" or agents of the Nation, enjoy tribal sovereign immunity for actions taken in furtherance of conducting official Nation business. *See Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir.1985) (protection of tribal sovereign immunity "extends to individual tribal officials acting in their representative capacity and

within the scope of their authority"). A tribal official--even if sued in his "individual capacity"--is only "stripped" of tribal immunity when he acts "manifestly or palpably beyond his authority." *Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343, 359 (2d Cir.2000). There are no allegations in this case that any defendant acted "without any colorable claim of [Nation] authority." *Bassett,* 221 F.Supp.2d at 281. To the contrary, throughout the complaint, plaintiffs assert that all named defendants "serve [defendant] Halbritter" as "members" of his administration and used their positions as Nation officials to discriminate against and abuse plaintiffs.

FN6. Plaintiffs contend that their tribal remedies, which involve cooperation with the inspection process and appearing in the Nation courts before judges, some of whom are defendants in this action, are futile. Defendants characterize the futility argument as speculative because plaintiffs have refused to participate in any tribal proceedings regarding the housing ordinance and it is not known what the outcome of any further inspections or condemnations will be since none have occurred. Defendants note that at least one property on Territory Road was found to be in compliance with the National Building Code after being inspected pursuant to the housing ordinance.

IV. CONCLUSION

In view of the foregoing, defendants' motion to dismiss the complaint is hereby *288 GRANTED and plaintiffs' motion for a preliminary injunction is DENIED.
IT IS SO ORDERED.

N.D.N.Y.,2003.
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Shenandoah v. Halbritter 275 F.Supp.2d 279, *288(N.D.N.Y.,2003)

United States Court of Appeals,
Second Circuit.

Maisie SHENANDOAH, Elwood Falcon, Diane Shenandoah, Adah Shenandoah, Minor Child by and through her Mother Diane Shenandoah, Pete Shenandoah, Minor Child by and through his Mother Diane Shenandoah, Cameron Shenandoah, Minor Child by and through his Mother Diane Shenandoah, Danielle Patterson, Clairese Patterson, Minor Child by and through her Mother Danielle Patterson, Jolene Patterson, Minor Child by and through her Mother Danielle Patterson, Preston Patterson, Minor Child by and through his Mother Danielle Patterson, Victoria Shcenandoah-Halsey, Matthew Jones, Wesley Halsey, Minor Child by and through his Mother Victoria Schenandoa-Halsey, Vincent Halsey, Minor Child by and through his Mother Victoria Shenandoah-Halsey, Monica Antone-Watson, Martina Watson, Minor Child by and through her Mother Monica Antone-Watson, Kyle Watson, Minor Child by and through his Mother Monica Antone-Watson, Lawrence Thomas and Arnold Thomas, Petitioners-Appellants, v.

Arthur Raymond HALBRITTER, Peter Carmen, Marilyn John, Dick Lynch, Paul Rinko, Stewart F. Hancock, Richard D. Simons, Arthur Pierce, Gary K. Gordon, "John Does", being all members of the Men's Council, "Jane Does", being all members of the Clan Mothers, Jeff Jost, Jack McQueenie, Dan Caputo; Kevin Storm; Chris Manwaring; Gene Rifenburg; Larry Kutz; Officer Urtz; Frank Siminelli; Lori Billy; Corky Ryan; Kevin O'Neil; Bill Pendock; and Oneida Housing Corporation, Respondents-Appellees.

No. 03-7862.

Argued: March 2, 2004 Decided: April 2, 2004.

Affirmed.

Donald R. Daines, Esq., Hill Wallack, Princeton, NJ, for Petitioners-Appellants.

Michael R. Smith, Esq., Zuckerman Spaeder LLP, Washington, DC, Mackenzie Hughes, L.L.P., David M. Garber, Esq., Syracuse, NY, Zuckerman Spaeder, L.L.P., Elizabeth Taylor, Esq. (Argued), William W. Taylor, Esq.,

Michael R. Smith, Esq., David A. Reiser, Esq., Washington, D.C., for Respondents-Appellees.
Before: VAN GRAAFEILAND, LEVAL, and CALABRESI, Circuit Judges.
VAN GRAAFEILAND, Senior Circuit Judge.

Petitioners appeal from the dismissal by the District Court for the Northern District of New York (Mordue, J.) of their habeas corpus petitions seeking relief against Arthur Raymond Halbritter, *et al.* under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.* Petitioners seek the only remedy available under the Act, a writ of habeas corpus, in an effort to prevent Respondents from enforcing an allegedly unlawful housing ordinance of the Oneida Indian Nation of New York. The District Court held that it did not have jurisdiction over this litigation. For the reasons that follow, we affirm.

Although there was an "ongoing intra-Oneida political dispute" as to whether Halbritter or Wilbur Homer was the Nation Representative of the Oneida Nation, *Homer v. Halbritter,* 158 F.R.D. 236, 237 (N.D.N.Y.1994), the Federal Government recognized Halbritter as the official representative of the Nation. *Shenandoah v. U.S. Dep't. of Interior,* 159 F.3d 708, 710 (2d Cir.1998). Petitioners assert, however, that Halbritter is using his power obtained through illegitimate means to suppress, harass, and intimidate various members of the Nation considered by Halbritter to be dissidents. Petitioners' first claim is that Halbritter, along with other named Respondents,*91 enacted an illegal housing ordinance permitting the seizure and destruction of their homes without providing just compensation. Petitioners claim further that the housing ordinance is a bill of attainder which was enacted with the specific intent to punish them for exercising various protected rights.

The ordinance at issue, No. 00-23, requires the Oneida Nation's Commissioner of Public Safety to: (1) inspect all homes located on Territory Road, a portion of Oneida Nation

lands known as the "32 acres," to ascertain compliance with the standards set forth in the National Building Code; (2) require rehabilitation of homes not in compliance if rehabilitation is possible; and (3) remove and/or demolish structures which cannot be repaired or rehabilitated.

The housing ordinance was upheld in September 2001 by Chief Judge Stewart F. Hancock Jr., of the Oneida Indian Nation Trial Court as valid under the ICRA and as a reasonable exercise of self-government. Judge Hancock's decision was affirmed by the Oneida Indian Nation Appellate Court in January 2002. Petitioners, who argued that the housing ordinance was an attempt to harass and intimidate them, resisted its implementation.

Petitioners' appeal focuses on the case of Danielle Patterson, who resided in a trailer on the "32 acres" with her three minor children. In November 2001, Ms. Patterson was arrested and then released after she resisted compliance with an inspection of her home.

Approximately a year later, on October 18, 2002, Patterson was arrested again and incarcerated for her failure to appear in court on criminal charges stemming from her 2001 altercation with tribal officers. She pled guilty to one count of criminal contempt for her failure to appear in court. Judge Richard Simons sentenced her to "time served" and released her immediately from custody. On October 23, 2002, Patterson's home was demolished.

Petitioners sought habeas relief under the ICRA, claiming that the Nation's enforcement of the housing ordinance violated numerous provisions of the Act. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction and Petitioners cross-moved for preliminary injunctive relief. The District Court held that it was without power, based on a lack of subject matter jurisdiction, to hear the case under the ICRA. Additionally, the District Court held that the housing ordinance did not operate as an unlawful

bill of attainder. Therefore, the District Court dismissed Petitioners' Complaint. For the reasons that follow, we affirm.

A party seeking to invoke the subject matter jurisdiction of a Court has the burden of demonstrating that there is subject matter jurisdiction in the case. *Scelsa v. City Univ. of New York,* 76 F.3d 37, 40 (2d Cir.1996). "Although Title I of ICRA lists a number of substantive rights afforded individuals that serve to restrict the power of tribal governments, Title I does not establish or imply a federal civil cause of action to remedy violations of § 1302." *Shenandoah,* 159 F.3d at 713 (citation omitted).

"Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302" *viz.* § 1303. *Id.* This section "makes available to any person '[t]he privilege of the writ of habeas corpus..., in a court of the United States, to test the legality of his detention by order of an Indian Tribe.' " *Id.* (quoting *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 882 (2d Cir.1996)). "Section 1303 was intended by Congress to have no *92 broader reach than the cognate statutory provisions governing collateral review of state and federal action," *id.* at 714 (quoting *Poodry,* 85 F.3d at 901 (Jacobs, J., dissenting)) and Petitioners "must allege that respondents pose a 'severe actual or potential restraint on [petitioners'] liberty.' " *Id.* (quoting *Poodry,* 85 F.3d at 880).

Respondents claim that because Petitioners have failed to allege or submit evidence that they are or were in actual custody at the time the lawsuit was commenced, this Court lacks subject matter jurisdiction. Although that might be true when custody is the issue, Petitioners point out that the habeas relief they seek addresses more than just actual physical custody; it includes parole, probation, release on one's own recognizance pending sentencing at trial, and in the case of tribal affairs, banishment.

The question then becomes whether the actions taken against the Petitioners have resulted in the legal equivalent of a banishment, or otherwise qualify as a "severe actual or potential restraint on [their] liberty," which might provide habeas jurisdiction. *Poodry*, 85 F.3d at 880. We determine the majority in *Poodry*, in interpreting the court's jurisdiction to encompass banishment, was concerned about the unique severity of that punishment. *Id.* at 896. [FN1] In the instant case, Respondents' enforcement of their housing ordinance did not constitute a sufficiently severe restraint on liberty to invoke this Court's habeas corpus jurisdiction.

FN1. In *Poodry*, the majority recognized the logical inconsistency that would flow from being unable to remedy a permanent banishment from the tribe: "We believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members 'convicted' of the offense of treason." *Poodry*, 85 F.3d at 895.

The gravamen of Petitioners' Complaint focuses on the destruction of their homes, which can be described more aptly as an economic restraint, rather than a restraint on liberty. As a general rule, federal habeas jurisdiction does not operate to remedy economic restraints. The imprisonment of Ms. Patterson for her alleged physical assault on Nation officers is too tenuously connected to the housing ordinance to provide habeas jurisdiction for an attempt to prevent the enforcement of that ordinance.

Because the only mechanism for federal enforcement of rights under ICRA is a federal habeas petition, and no detention has been established, the District Court properly dismissed Petitioners' claim for lack of subject matter jurisdiction. Even though the actions of the ruling members of the Nation may be partly inexcusable herein, we can only remedy those wrongs which invoke the jurisdiction of this Court. Unfortunately for Petitioners, Constitutional provisions limiting federal or state authority do not, *per se*, control the

actions of the tribal governments complained of herein. *Poodry,* 85 F.3d at 881 n. 7.

Petitioners fare no better by attempting to demonstrate that the housing ordinance is a bill of attainder. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without...the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Petitioners claim that the housing ordinance is designed to remove them from the Nation as punishment for their constant dissent. However, the terms of the Ordinance apply to all residents of the territory at issue, and cannot be said to single out any individuals. Petitioners have not shown that the housing ordinance is a bill of attainder.

In holding as we do, we are not unmindful of the following warning of Alexander Hamilton quoted in *United States v. Brown,* 381 U.S. 437, 444, 85 S.Ct. 1707, 14 L.Ed.2d 484:

> "If [a] legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."

If this danger exists in cases such as the instant one, and the presence of twenty or thirty Indian women engaged in prayer in the courtroom and adjoining hallway when this appeal was argued is some indication of its possible existence, Congress should consider giving this Court power to act. The judgment of the District Court is hereby AFFIRMED. C.A.2 (N.Y.),2004. Shenandoah v. Halbritter 366 F.3d 89 END OF DOCUMENT Shenandoah v. Halbritter 366 F.3d 89, (C.A.2 (N.Y.),2004)

United States Court of Appeals For the Second Circuit Thurgod Marshall U.S. Court House 40 Foley Square New York 10007	*STAMPED* United States Court of Appeals FILED SEP 14 2004 Roseann B. MacKechnie Clerk SECOND CIRCUIT

Roseann B. MacKechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 14th day of September two thousand four.

03-7862

SHENANDOAH v. HALBRITTER

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellants Maisie Shenandoah, Elwood Falcon, Diane Shenandoah, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: Arthur Helle
Motion Staff Attorney

(2)

Supreme Court, U.S.
FILED
MAR 15 2005
OFFICE OF THE CLERK

No. 04-803

IN THE

Supreme Court of the United States

MAISIE SHENANDOAH, *et al.*,
Petitioners,

v.

ARTHUR RAYMOND HALBRITTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

For the reasons discussed below, there is no subject matter jurisdiction.

STATEMENT OF THE CASE

A. Habeas Petition

Petitioners filed a habeas corpus action under the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*. (ICRA), naming as respondents members of the government of the Oneida Indian Nation of New York, the Nation's housing corporation and its director, two tribal judges (the Honorable Stewart F. Hancock and the Honorable Richard D. Simons, both retired from the New York Court of Appeals), the Nation's prosecutor, the Nation's Public Safety Commissioner, and numerous Nation police officers. (CAJA 29-55).[1] 25 U.S.C. § 1303 provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Petitioners were unclear about what order of detention they sought to challenge. They generally alleged in their petition that the Nation's government had enacted an ordinance providing for inspection of all housing located on land owned by the Nation along Territory Road and providing for the removal of any housing found to be unsafe and irreparable, had enacted another ordinance providing subsidies and loan guarantees to facilitate the construction of new housing, and, as political retaliation, had denied petitioners those financial

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[1] Petitioners' complaint also sought an injunction against violations of ICRA, the United States and New York Constitutions, and the Great Law of Peace of the Haudenaosaunee. (*Id.* at 30, ¶ 1). The complaint alleged jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4), predicating federal question jurisdiction on the National Environmental Policy Act and the Administrative Procedure Act as well as ICRA. (*Id.*, ¶ 4).

benefits as members not in good standing. The petition claimed that all of this constituted "detention by order of an Indian tribe" under ICRA because petitioners could not afford (without subsidies) to build housing to replace their trailers, all but one of which the Nation's Commissioner of Public Safety found to be dangerous after inspections and ordered removed (the Nation Court subsequently affirmed that order).[2]

B. Decisions Below

The district court dismissed the petition. (Pet. App. A-1-17). The court noted that the Indian Civil Rights Act provides only one federal court remedy for violations of the Act, a writ of habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). ICRA restricts the writ's availability to those who are in detention, which the district court accepted as the equivalent of the custody requirement applicable to all writs of habeas corpus. The court held that *actual* physical confinement is *not* required but that petitioners' allegations regarding housing did not amount to detention under any standard. (Pet. App. A-11-13). The court also held the Nation's housing ordinance requiring removal of dangerous housing is not a bill of attainder because

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[2] In 2000, the Nation enacted an ordinance "to eliminate dilapidated and unsafe housing on that portion of Nation lands commonly referred to as Territory Road." Whether members are in good standing or not, they are entitled under the ordinance to relocation assistance and to fair market compensation for any unsafe housing that must be removed (in no event less than $1,000). (CAJA 89-90). In 1998, the Nation established a program of financial subsidies and loan guarantees to facilitate the construction of housing. (*Id.* at 374). Also in 1998, the Nation enacted a separate ordinance adopting the National (now International) Building Code. (*Id.* at 91-96). The Nation trial and appellate court decisions authorizing the housing inspections and approving the condemnation orders are found at CAJA 227-40 (order authorizing inspection) (Hancock, J.); 241-45 (affirming inspection order) (Simons, J.); 98-108 (upholding condemnation order) (Hancock, J.); 740-41 (authorizing additional inspections); CA Special Appendix (SPA2) 16 (order upholding additional condemnations).

it does not "target individuals nor does it 'punish' persons in the traditional prohibitive sense." (*Id.* at A-13). The court specifically addressed the circumstances of the one petitioner who was arrested and whose trailer was removed. The court noted that the Nation offered her subsidized rental housing in the Nation's new housing development (CAJA 79), and that she refused. (Pet. App. A-4-5, n.1). The court also noted that she pleaded guilty in Nation court and was sentenced to time served and told that she was "free to go" long before suit was filed. (*Id.* at A-5).

The court of appeals affirmed in a unanimous decision (Leval, Calabresi & Van Graafeiland, JJ). (Pet. App. A-18-23). The court held that enforcement of the Nation's housing ordinance involved "economic restraint" and "did not constitute a sufficiently severe restraint on liberty" to satisfy the detention/custody requirement for the writ of habeas corpus. (Pet. App. A-22). The court further held that the Nation's ordinance requiring removal of unsafe housing is not a bill of attainder because it applies to all who live along Territory Road "and cannot be said to single out any individuals." (Pet. App. A-23). *See also* CAJA 75 (ordinance applies to all homes on "32 acres"); *id.* at 766-67 (home of tribal council member was condemned); *id.* at 927 (one of the petitioners' trailers passed inspection). Rehearing was denied. (Pet. App. A-24).

REASONS FOR DENYING A WRIT OF CERTIORARI

The law governing suits under the Indian Civil Rights Act is settled. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70 (1978), the Court held that there is no private right of action under the Act, which the Court construed to provide a single, exclusive remedy – a writ of habeas corpus pursuant to 25 U.S.C. § 1303. "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303." *Id.* at 70. Petitioners do not

ask the Court to overrule *Santa Clara*. Nor do petitioners dispute that, under the explicit terms of the Act, the writ to which they are limited by *Santa Clara* is available only "to test the legality of detention by order of an Indian tribe." 25 U.S.C. § 1303.

In their clearest statement of their position, petitioners claim they were entitled to a writ of habeas corpus because denial of financial benefits to build new houses produces a "cumulative impact" that constitutes a bill of attainder. Pet. 10-11. Petitioners maintain that a bill of attainder is "[b]y definition" sufficient to establish detention/custody. Pet. 15; *see also, id.* at 21, 24, 25, 27. Neither proposition warrants this Court's review.[3]

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[3] S. Ct. Rule 14.4 provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for this Court to deny a petition." Here, the petition is not accurate, brief, or clear. The absence of brevity and clarity is apparent on the face of the petition. Inaccuracies are liberally sprinkled throughout, as suggested by the absence of record citation for most of the incendiary statements in the petition. It is impossible, within the limits of a brief in opposition of reasonable length to list all of the misstatements of law and fact in the petition, however the following misstatements are of the most direct relevance to what issues would be before the Court if certiorari were granted, S. Ct. Rule 15.2:

- The petition (at p. 5) asserts that the Nation pronounced petitioners guilty of "treason." There is no citation to support that statement, and it is false; petitioners never were accused of, tried for or convicted of treason.
- The petition asserts (at p. 9) that the Nation's housing code consisted of selective, tailored standards "specifically chosen to fail petitioners' homes." There is no citation to support that statement; it is false; the Nation adopted the National (now International) Building Code, without change. Oneida Indian Nation Amended Health and Safety Ordinance, No. O-94-01B, § 5.3 (CAJA 93). Inspections are conducted by an

Footnote cont'd

I. THERE IS NO SPLIT IN THE CIRCUITS TO RESOLVE.

Petitioners assert: "This case presents the cleanest circuit split imaginable." Pet. 21. No citation to a decision of any court of appeals follows this strong statement. Instead, petitioners cite two district court opinions. There is, then, no split in the circuits. Moreover, neither cited district court decision involves issuance of a writ of habeas corpus, nor does either decision speak to the detention/custody analysis principally underlying the court of appeals' decision in this case. *See Santa Ynez Band v. Torres*, 262 F. Supp. 2d 1038, 1046-47 (C.D. Cal. 2002) (tribal member could assert the Indian Civil Rights Act as defense in civil action brought by tribe seeking order compelling member's removal from reservation); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969) (pre-*Santa Clara*

Footnote cont'd

independent contractor who serves as a registered code compliance officer for other local governments. (*Id.* at 104).

- Petitioners assert (at p. 11) that they cannot live on Nation lands and (at p. 19) that they will be homeless if they leave their current homes. There is no citation to support these statements, and they are false; petitioners refused to complete applications for housing at the Nation's Village of the White Pines or at other Nation-owned housing, all of which is on the Nation's lands at rents prorated to petitioners' ability to pay. (CA Supp. SPA-8).
- The petition (at p. 12) asserts that one petitioner was arrested and jailed when she protested an inspection of her trailer. There is no citation to support that statement, and it is false; that person was arrested when she assaulted a police officer, immediately released on her recognizance, and arrested again only after she refused to appear in the Nation Court for trial. (Pet. App. A-4-5).
- The petition asserts (at p. 8) that respondents conceded that housing ordinances were passed with the intention of singling out petitioners and removing their trailers; there is no citation to support that statement, and it is false; respondents filed the affidavit of the Nation lawyer alleged to have said that, and he flatly denied it. (CAJA 663).

decision permitting implied private right of action under Indian Civil Rights Act).

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, WHICH HAS SETTLED THE LAW REGARDING CLAIMS UNDER THE INDIAN CIVIL RIGHTS ACT.

Petitioners do not identify a decision of this Court that conflicts with the decision of the court of appeals. With regard to the detention/custody question, petitioners identify no decision of this Court holding that removal of unsafe housing or denial of financial benefits to build new housing can place a person in detention/custody.[4] Indeed, the petition refers only to two decisions of this Court concerning custody in the habeas corpus context, *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Hensley v. Municipal Court,* 411 U.S. 345 (1973). Pet. 28, 30. These are the two cases on which the court of appeals had relied in *Poodry v. Tonawanda Band*, 85 F.3d 874, 893-94 (2d Cir. 1996). The court of appeals below heavily relied on *Poodry* and *accepted* petitioners' argument that actual physical confinement

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[4] The court of appeals' decision is consistent with other circuit decisions holding the writ of habeas corpus unavailable to remedy complaints regarding property, financial matters, licensing issues and the like. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) (tribal court ordered seizure and sale of the petitioner's truck, loader and a motor home to satisfy fine imposed for unlawful logging; petitioner was not subject to "detention" within the meaning of 25 U.S.C. § 1303); *see also Kaminski v. United States*, 339 F.3d 84 (2d Cir.) (order of restitution not custody), *cert. denied,* 540 U.S. 1084 (2003); *Gardner v. Ute Tribal Court Chief Judge*, No. 01-4037, 2002 U.S. App. LEXIS 1097 (10th Cir. Jan. 25, 2002) (order denying plaintiff right to practice law in tribal court not custody); *Lillios v. New Hampshire*, 788 F.2d 60 (1st Cir. 1986) (fines and suspension of driver's license not custody); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984) (loss of driving privileges not custody); *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975) (fine not custody).

is not required for issuance of the writ, deciding only that petitioners had not adequately pleaded detention or custody by challenging housing removal and the denial of financial assistance. (Pet. App. A-21-22). Neither *Jones*, which held that parole satisfies the habeas custody requirement, nor *Hensley*, which held that a defendant released on his own recognizance satisfies the habeas custody requirement, is in conflict with the court of appeals' decision below.[5]

With regard to whether, custody aside, petitioners adequately alleged a bill of attainder, the court of appeals simply determined that the ordinance requiring the removal of unsafe housing applies to all residents along Territory Road, not just petitioners, and then applied *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), which establishes that a bill of attainder must inflict punishment upon an identifiable individual or individuals. Petitioners argue that *Nixon* was misapplied in light of the particular facts they allege. Petitioners are plainly wrong, as they concede that the housing safety ordinance applies to everyone and that its application led to the condemnation and removal of other housing, including that of a member of the Nation's government (who, indeed, is one of the John Doe

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[5] *Dry v. CFR Court of Indian Affairs*, 168 F.3d 1207 (10th Cir. 1999), cited at page 30 of the petition, involved pretrial release in a tribal criminal case. The expansion of detention/custody that petitioners propose would have significant federalism implications. If petitioners were correct, then federal district courts would be asked to review final state court judgments involving allegedly politically motivated housing condemnation orders through habeas corpus petitions. *See Garry v. Geils*, 82 F.3d 1362, 1363, 1365 n.4 (7th Cir. 1996) (applying *Rooker-Feldman* doctrine to dismiss a § 1983 challenge to state condemnation order alleged to be an act of "political retaliation," and noting that habeas corpus is an exception to *Rooker-Feldman* prohibition against review of state court judgments); *Gisslen v. City of Crystal*, 345 F.3d 624 (8th Cir. 2003) (applying *Rooker-Feldman* to dismiss § 1983 suit challenging state condemnation action as retaliation for earlier protests against the city's actions).

respondents alleged to be a member of the Nation's Men's Council). Pet. 10. As for petitioners' additional argument that the Nation's decision to deny them subsidies and loan guarantees to facilitate construction of new housing, they identify no decision of this Court suggesting that such a denial can be a bill of attainder. *See Selective Service v. Minn. PIRG*, 468 U.S. 841 (1984) (denial of governmental benefit cannot be a bill of attainder).

III. PETITIONERS FAILED TO EXHAUST TRIBAL REMEDIES.

Petitioners boycotted tribal remedies. Because the district court dismissed, and the court of appeals affirmed, on grounds other than the failure to exhaust, neither reached this issue. The failure to exhaust would be, nevertheless, a reason for the Court to deny a writ of certiorari, even if the petition presented a question otherwise worthy of review.

There are three ways in which petitioners failed to exhaust tribal remedies.

First, petitioners refused to complete applications for first-rate housing in the Nation's new Village of the White Pines or at other Nation-owned properties, all presenting an opportunity where rent could be prorated based on the petitioners' financial means. (CAJA 79; Supp. SPA 8). As petitioners' arguments are tied heavily to allegations of homelessness, their failure to complete tribal applications for alternative housing undermines their claims regarding a bill of attainder and detention/custody.

Second, after receipt of the order of the Commissioner of Public Safety declaring petitioners' housing to be unsafe and subject to removal, petitioners were entitled to review in the Nation's Court, which they sought. Petitioners, however, never challenged the accuracy of the inspection reports finding unsafe the housing of all but one of them. Instead, they challenged

only "the legitimacy of the present Oneida Nation government and its leaders and the process by which the various housing ordinances were adopted." (CA SPA2 16). The Indian Civil Rights Act affords no right to live in unsafe housing.

Third, petitioners became members not in good standing, which is why they have not received the financial benefits they want, after participating in concerted action with members of a "Warriors" group that had previously committed arsons and assaults at the Nation. *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992); *Oneida Indian Nation v. Hill*, Civ. No. 88-CV-29, 1990 U.S. Dist. LEXIS 10813 (N.D.N.Y. Aug. 15, 1990). All members who ceased to be in good standing were summoned to appear before the Nation's government to explain themselves and to be reinstated as members in good standing upon making a promise to work peacefully for political change and to renounce violence. Petitioners refused to appear when summoned. Those who did were reinstated to membership in good standing.

Thus, having boycotted tribal remedies that can provide alternative housing and reinstatement to good standing, and having failed in the tribal court to contest the finding that their housing is unsafe, petitioners cannot be entitled to the federal writ of habeas corpus they seek, even if they had adequately pleaded the other elements of a habeas corpus claim under the Indian Civil Rights Act. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 81 (2d Cir. 2001) (exhaustion rule "bar[s] interference by federal courts to defeat or circumvent the ongoing exercise of jurisdiction by tribal courts"); *Longie v. Pearson*, No. 99-4142, 2000 U.S. App. LEXIS 7255, at * 4 (8th Cir. April 21, 2000) (petitioner claiming illegal removal from position as Chief Judge must exhaust tribal remedies); *Harvey v. Star*, No. 95-2283, 1996 U.S. App. LEXIS 23870, at *6 (10th Cir. Sept. 10, 1996) (claim that tribal court exceeded jurisdiction in issuing custody order requires exhaustion of tribal remedies). *See also National Farmers Union Ins. Cos. v. Crow Tribe*, 471

U.S. 845, 856-57 (1985) (petitioners who challenge in federal court the jurisdiction of a tribal court to entertain a cause of action must first present claim to tribal court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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